IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No.

~~76-159~~

JOSEPH DIACO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FREDERIC C. RITGER, JR.,
Counsel for Petitioner, Joseph Diaco,

106 Valley Street,
South Orange, New Jersey 07079

N.J. Appellate Printing Co., Inc., South Plainfield, New Jersey (201) 753-0200

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Joseph Diaco prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on June 2, 1976.

OPINION BELOW

The Opinion of the Court of Appeals for the Third Circuit is not yet reported and is printed in the Joint Appendix filed with this Petition (1a-50a).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 2, 1976. A timely Petition for Rehearing was filed and said Petition was denied on July 7, 1976. The jurisdiction of this court is envoked under Title 28 U.S. Code, Section 1254(1).

QUESTION PRESENTED

Whether the trial judge, accused of personal bias, committed error by refusing to disqualify himself.

STATUTES INVOLVED

Title 28 U.S. Code, Section 144 and Title 28 U.S. Code, Section 455.[1]

STATEMENT OF THE CASE

Petitioner, Joseph Diaco, seeks review of a judgment entered on June 3, 1975 in the United States District Court for the District of New Jersey (Lacey, J. presiding), and affirmed on June 2, 1976 by the United States Court of Appeals for the Third Circuit (rehearing denied July 7, 1976).

Prior to trial, the petitioner filed timely motions under the provisions of Title 28 U.S. Code, Section 144 which sought to have the district judge disqualify himself on the grounds of bias.

The petitioner, Diaco, was in 1969 and also at the time of the indictments herein, an officer and part owner of Valentine Electric Co., Inc., a New Jersey corporation. That corporation was engaged in the business of electrical contracting. On or about October 8, 1969, the trial judge in the present case, but then the United States Attorney for the District of New Jersey, made a speech where he singled out Valentine Electric for special attention. Newspaper articles of the time reported that he had said,

1. Reprinted in Joint Appendix filed with this Petition.

> "I say this—any competitor of Valentine, or any businessman who has reason to complain of Valentine's methods need only come to me. I'll order an immediate investigation."

Subsequent to the above statement, the trial judge while serving as U.S. Attorney, repeatedly singled out Valentine Electric and conducted vigorous investigations of the company's affairs. Petitioner, Diaco was called before the Federal Grand Jury on two separate occasions and was questioned about the manner in which Valentine Electric obtained its contracts. F.B.I. investigators were often on the premises of Valentine Electric, and indictments were returned against a stock holder and an employee of Valentine Electric.

In 1974 after the trial judge had been elevated to the bench, a series of indictments were returned against the petitioner herein. The first indictment returned May 31, 1974 named the petitioner, Diaco along with another individual, Arthur Sutton, who later pleaded guilty to a criminal information and testified on behalf of the government.

Approximately three months after the indictment but well before the date scheduled for trial, Diaco moved for the District Judge's recusal under the provisions of Title 28 U.S.C. §144. At the hearing on the motion, the trial judge questioned the good faith of the attorney's certificate which accompanied the petitioner's affidavit. In two hearings which were most intimidating, the attorneys for the petitioner, obviously in fear of their own good standing at the bar, were "forced" by the court to make certain concessions which were outside the allegations of the affidavit of the petitioner.

The trial judge, concerned with the way the affidavit of Diaco reflected upon his "capacity and integrity," denied

the motion and issued a memorandum opinion which, in severe terms, took counsel to task for their failure to include, in the affidavit of Diaco, certain items of doubtful relevancy.

Immediately after denial of the motion, counsel for Diaco were relieved from the case and new counsel was substituted.

Within days thereafter, a second indictment was returned charging Diaco and a number of others with violations of the *Travel Act* (18 U.S.C. §1952). Prior to arraignment on the second indictment, Diaco moved for recusal of the trial judge. Diaco's second affidavit was modified in some respects from the earlier one. Without hearing oral argument, the trial judge denied the motion and issued a second memorandum opinion. That opinion reiterated and added to the arguments and the reasons for the trial judge's action on the prior motion.

In December, 1974, a third indictment superseded the earlier ones and again the petitioner moved for recusal of the trial judge. The court again denied the motions, this time without an opinion but again referred to the earlier rulings as the basis for the denial.

The affidavits filed by the petitioner were the result of a "growth process" caused by the actions of the trial judge. Had the court properly dealt with the first affidavit, the need for a second affidavit would never have arisen. The Court of Appeals erred in considering the court's action with respect to first affidavit as "moot" (Note #5, page 21a-22a).

The three indictments against Diaco remained open of record until after judgment on the indictment of December 1974. The petitioner could not test the ruling until after judgment. See *Green v. Murphy*, 259 F.2d

591 (3rd Cir. 1958). The trial court dealt with the later affidavit in the context of the first, and stated that there were no new issues raised. The main reasons asserted by the trial judge for denial of the various motions involved matters based upon his own recollection of what occurred during his tenure as U.S. Attorney.

> "Since I personally, as United States Attorney had the decision making function as to whether or not to prosecute Valentine Electric Company, and made the determination not to prosecute it (or any of its officers, directors or stockholders other than Boiardo or Biancone), there is no reasonable basis for the movant's belief that 'Judge Lacey considers that Valentine Electric Company has used and uses bribery, extortion and other criminal conduct to further its business.'" (Memorandum Opinion Sept. 6, 1974, page 18)

The same recollection was the foundation for his later decisions. To put it plainly, the trial judge went outside the affidavits to find the material with which to refute the allegations therein.

REASONS FOR GRANTING THE WRIT

I. The court should exercise its supervisory power over the administration of justice in the Federal Courts and clearly delineate the grounds upon which a motion for recusal must be granted.

The court in *Berger v. United States*, 255 U.S. 22, 35 (1921) said,

> "We are of the opinion . . . . that an affidavit on information and belief satisfies the section and that upon its filing, if it shows the objectionable inclination or disposition of the judge, which we have said is an essential condition, it is his duty to 'proceed no further' in the case. And in this there is no serious detriment to the administration of justice nor inconvenience worthy of mention, *for of what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside?*" (emphasis supplied)

Section 144 of Title 28 U.S. Code provides,

> "Whenever a party to any proceeding in a District Court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of an adverse party, such judge shall proceed no further therein but another judge should be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than 10 days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It should be accompanied by a certificate of counsel of record that it is made in good faith."

It would appear from a reading of the section that Congress intended that §144 be peremptory since it seems to strip the judge of all discretion once a sufficient affidavit is filed.

In *Berger v. United States, supra,* the court held that the power of the trial court was limited to a consideration of the legal sufficiency of the affidavit. Once that condition was fulfilled, the trial court had no alternative but to proceed no further.

The statute as interpreted by *Berger* left no room for the type of proceeding with which we are faced here where the trial court substituted its outside recollection for facts alleged in the affidavit.

The Third Circuit Court of Appeals in *Green v. Murphy*, 259 F.2d, 591, 593 (3rd Cir. 1958), in dealing with a petition for mandamus or prohibition from a denial of a recusal motion, stated that the court was of the opinion that the legal principles concerning recusal under Section 144 were clearly defined. The court held the United States District Judge possesses the jurisdiction and the power to pass upon the question as to whether he must withdraw from the case by reason of the allegations of his disqualification contained in the affidavit required by the statute. *Behr v. Mine Safety Appliances Co.*, 233 F.2d 371 (3d Cir. 1957), *cert. den.* 352 U.S. 942, 77 Sup. Ct. 264, 1 L.Ed. 2d, 237 *reh. den.* 352 U.S. 976, 77 Sup. Ct. 353, 1 L.Ed.2d, 329 (1957).

The Court of Appeals further stated, *Green v. Murphy, supra,* page 593,

> "Only what is set forth in the affidavit of bias and prejudice is material to the issue of disqualification."

That last statement brings us directly into confrontation with the approach which the trial court took on the

argument in the first of the recusal motions, which was, of course, carried over into the later motions. There the trial court insisted upon broadening the scope of the affidavit to include several things which had occurred sometime late in 1970 or early 1971 while the trial judge was still the United States Attorney for the District of New Jersey. We do not over-exaggerate or use language too strong when we state that the trial judge forced the defense attorneys to agree to a stipulation setting forth facts which were not contained in the affidavit filed by Diaco. In an intimidating session, the court raised implications of bad faith on the part of counsel and castigated a member of the firm representting Diaco.

It was argued by the United States Attorney and, as we said, determined by the Court of Appeals, that the above procedure was "moot" because the indictment under which the hearing was had was later superseded and then much later dismissed.

We submit that the first motion is not "moot" because the reasoning for its denial was the foundation for the later denials.

The principal issue as we see it is whether the affidavit as filed by Diaco is sufficient on its face to point up a prejudice of such a nature that the trial judge was required as a matter of law to remove himself from the case. In approaching this question, we do so bearing in mind the language of the court in the case of *In Re: Murchison*, 349 U.S. 133, 136 (1955), "[T]o perform its highest function in the best way, justice must satisfy the appearance of justice." See also, *Offutt v. United States*, 348 U.S. 11 (1954).

The affidavits, while not saying so directly, leave no doubt that the trial judge, while U.S. Attorney, was "out

to get" the officers and directors of Valentine Electric. There is further no question but that the petitioner feared the same attitude when the trial judge was assigned to the trial of the indictments herein.

It is elementary that a motion to disqualiify the trial judge will not be considered unless it is accompanied by the affidavit required by the section. *Galella v. Onassis*, 487 F.2d 986 (2nd Cir. 1973). In *United States v. Gilboy*, 162, F. Supp. 384 (D.C. Pa. 1958), the court required that time, place, persons, occasions and circumstances must be set forth with at least the degree of particularity one would expect to find in a bill of particulars. In the case of *Nations v. United States*, 14 F.2d 507 (8th Cir. 1926), *cert. den.* 273 U.S. 735. The court said that the statute was to be strictly construed but then said that the affidavit need not be drawn so as to fulfill the technical requirements of an indictment. In order to satisfy the requirements of the section, the affidavit must be made by a party. It has been held that affidavits by attorneys are insufficient. *U.S. ex rel. Wilson v. Coughlin*, 472 F.2d 100 (7th Cir. 1973); *Giebe v. Pence*, 431 F.2d 942 (9th Cir. 1970); *Anchor Grain Co. v. Smith*, 297 F. 204 (5th Cir. 1924); *Cuddy v. Otis*, 33 F.2d 577 (8th Cir. 1929). In the present case, the petitioner Diaco, met the test of specificity.

The courts have always stated that an affidavit is insufficient standing alone unless accompanied by a certificate of good faith by counsel of record. See *Curtis v. Utah Fuel Co.*, 59 F. Supp. 680 (D.C.N.J. 1944), *aff'd* 148 F.2d 340 (3rd Cir. 1944), *cert. den.* 326 U.S. 724, 90 L.Ed. 429, 66 Sup. Ct. 29 (1944). *Boyance v. United States*, 275 F. Supp. 772 (D.C. Pa. 1967). The courts have gone so far as to refuse to consider an affidavit accompanied by the food faith certificate, where, when counsel refused

to sign the certificate, the defendant had sought to appear *pro se*. *Mitchell v. United States*, 126 F.2d 550 (10th Cir. 1942), *cert. den.* 316 U.S. 702 (1942). See *Harris v. Britton*, 361 F. Supp. 528 (D.C. Okla. 1973). See also *Re Beecher*, 50 F. Supp. 530 (D.C. Wash. 1943). In the present case, the attorney of record on the occasion of each of the motions signed and filed a certificate of good faith. As for the purpose of the certificate of good faith see *Cuddy v. Otis*, 33 F.2d 577 (8th Cir. 1929); *Morse v. Lewis*, 54 F.2d 1027 (4th Cir. 1932), *cert. den.* 286 U.S. 557; *Morrison v. United States*, 432 F.2d 1227 (5th Cir. 1970), *cert. den.* 401 U.S. 945, *United States v. Hanrahan*, 248 F. Supp. 471 (D.C. D.C. 1965).

Whether the certificate is to certify to the good faith of the client or to certify to the good faith of both client and counsel has been the subject of some debate. In the Third Circuit in *Flegenheimer v. United States*, 110 F.2d 379 (3rd Cir. 1936), the court held that so long as the defendant honestly believed that the trial judge was biased and stated the facts upon which he based his opinion, it was proper for him to call upon his counsel to give the certificate provided by the state in order to have the question of bias determined, however, *United States v. Gilboy*, 162 F. Supp. 384 (D.C. Pa. 1958) seems to require more of counsel. See also *In Re: Union Leader Corp.*, 292 F.2d 381 (1st Cir. 1961), *cert. den.* 368 U.S. 927, *United States v. Hanrahan*, 248 F. Supp. 471 (D.C. D.C. 1965). In the present case, it is represented that the certificate filed was intended to conform to the strictest rule.

The affidavit of Joseph Diaco in support of recusal motions and the certificate of good faith filed by counsel, we submit, states with particularity such material facts as would lead any reasonable man to conclude that the trial judge manifested a long-standing, irrevocable and irrefut-

able personal bias towards the movant. This would have the inevitable effect of precluding him from acting as "a neutral factor in the interplay of adversary forces"—the proper role of a judge in a criminal trial. *American Bar Association Standard Relating to the Function of the Trial Judge*, p. 3, June, 1972. *A fortiori*, the trial judge should have "proceed(ed) no further therein" and was duty-bound to disqualify himself as a matter of law. 28 U.S.C. §144; *United States v. Thompson*, 483 F.2d 527 (3rd Cir., 1973); *United States v. Townsend*, 478 F.2d 1072 (3rd Cir. 1973). See also, dissent of J. MacKinnon in *Mitchell v. Sirica*, 502 F.2d 375 (D.C. Cir. 1974); *Disqualification of a Federal District Judge for Bias*, 57 Minn. L. Rev. 749 (1973); *Disqualification of Judges for Bias in the Federal Courts*, 79 Harv. L. Rev. 1435 (1966).

Aside from the requirements of 28 U.S.C. §144, it was incumbent upon the trial judge to recuse himself pursuant to Canons 2 and 3(c) of the *Code of Judicial Conduct* (Final Draft, May, 1972). Canon 2, in relevant part, requires that judges "avoid impropriety *and the appearance of impropriety.*" Canon 3(c) mandates that the trial judge recuse himself whenever he has any doubt as to his ability to preside impartially in a criminal case *or whenever he believes his impartiality can be reasonably questioned*. As stated in the commentary to section 1.7 of the *American Bar Association Standards Relating to the Function of the Trial Judge* both Canons are grounded upon the proper assumption that,

> "the appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice."

In the instant case, measured by an objective standard, as a matter of fact and law, it was incumbent upon

the trial judge to conclude that given his publicly stated intentions and his predominant role in the widespread and continuous criminal investigations of Valentine Electric and its principals while he served as United States Attorney, his impartiality as a judge in a criminal trial involving, among others, Joseph Diaco, would be reasonably, if not assuredly, questioned—and properly so!

The Court's misplaced belief that despite the compelling nature of the facts presented in the recusal affidavits, he could, nevertheless, be impartial, is of no consequence in light of 28 U.S.C. §144, the Canons of Judicial Ethics and in light of everyday teaching and experience. As Judge Cardozo long-ago aptly observed:

> "There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the result is an outlook on life, a conception of social needs, a sense in James' phrase of "the total push and pressure of the cosmos," which, when reasons are nicely balanced, must determine where choice will fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. To that test they are all brought—a form of pleading or an act of parliament, the wrongs of paupers or the rights of princes, a village ordinance or a nation's charter."

Cardozo, (*The Nature of the Judicial Process*, Yale University Press, pps. 12-13, 1922).

Since during a trial the judge inevitably must assess the credibility of witnesses, react to the evidence presented and ultimately determine in his own mind the guilt or innocence of the defendant, it has been aptly stated that due process of law requires that "no man may accuse and also sit in judgment," *Mitchell v. Sirica*, 502 F.2d 375, 385 (D.C. Cir. 1974).

Again the question is whether the information contained in the affidavit is sufficient to cause the judge, accepting it all as true, to remove himself from the case.

It might help to consider the fact that the indictments were accompanied by broad publicity as alleged in the affidavit, particularly concerning the alleged threat upon the life of a principal witness for the prosecution and the allegations of a "mob" connection with Diaco. As the publicity unfolded, it was obvious from a reading of the various newspapers that the reporters had made good use of old accounts of Valentine Electric Co. which were generated originally in 1969-1970 by the present trial judge.

If nothing else, the pervasive publicity surrounding this case and the trial judge's previous role in the widespread and continuous criminal investigation of Valentine Electric and its principals created a strong *appearance of bias*. In the absence of actual proven bias, it seems that the appearance of bias is sufficient to require the disqualification of the trial judge. The court appears to have raised the "*appearance of bias*" test to the constitutional level. *Tumey v. Ohio*, 373 U.S. 510, 47 S. Ct. 437, 71 L.Ed. 749 (1927). *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S. Ct. 337, 21 L.Ed.2d 301 (1968). In the latter case, the court in referring to the Cannon of Judicial Ethics on social relations of judges, stated that:

> "Any tribunal permitted by law to try cases and controversies not only must be unbiased but also avoid even the appearance of bias." (*Commonwealth Coatings Corp. v. Continental Casualty Co., supra.*, page 150).

Before the trial of the third indictment, Congress amended Title 28 U.S. Code §455 to include the following:

> "(a) Any justice, judge, magistrate or referee in bankruptcy of the United States *shall* disqualify himself in any proceeding in which his impartiality might reasonably be questioned." (emphasis supplied)

The foregoing amendment of December 5, 1974 was effective before the matter herein was moved for trial and appears to emphasize the holdings of the court in *Tumey v. Ohio*, 373 U.S. 510 (1927). *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968). See also, *Cindarella Career and Finishing Schools, Inc. v. F.T.C.*, 425 F.2d 583, 591 (D.C. Cir. 1970); *Texaco, Inc. v. F.T.C.*, 336 F.2d 754, 760 (D.C. 1964) *vacated and remanded on other grounds*, 381 U.S. 739 (1964), *Amos Treat & Co. v. S.E.C.*, 306 F.2d 260, 267 (D.C. Cir. 1962).

Circuit Judge MacKinnon stated the position of petitioners most eloquently in his dissenting opinion in *Mitchell v. Sirica*, 502 F.2d 375 (D.C. Cir. 1974) when citing *In Re Murchinson*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L.Ed. 942 (1955) he stated,

> "[S]uch a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between the contending parties. But to perform its high function in the best way justice must satisfy the appearance of justice."

II. The Court of Appeals used an improper standard in coming to its decision in this case.

In the first instance, the court stated that,

> "A trial judge need only recuse himself if he determines that the facts alleged in the affidavit, taken as true are such that they would convince a reasonable man that he harbored a personal, as opposed to a judicial, bias against the movant. *United States v. Thompson*, 483 F.2d 527 (3rd Cir. 1973)." 23a-24a)

We agree that the aforestated sets forth a proper test for assessing the effectiveness of an affidavit of bias. In the present case, unfortunately, the Circuit Court then misconstrued the meaning of the word "personal" and made the following evaluation.

> "Neither Valentine nor Diaco make a single allegation indicating that the District Judge ever manifested, by word or deed any hostility, animosity, or, for that matter, any emotion whatsoever toward them *personally*."

It is submitted that when the word personal is used in the statute, it refers to a bias on the part of the judge in a personal rather than judicial capacity not a bias directed against a specific individual. See *Berger v. United States, supra; United States v. Townsend*, 487 F.2d 1072 (3rd Cir. 1973).

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

/s/ Frederic C. Ritger, Jr.
FREDERIC C. RITGER, JR.
Counsel for Petitioner,
Joseph Diaco